Supreme Court, U.S.
FILED
NOV 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-645

In The
Supreme Court of the United States
October Term, 1986

E. MARIE HOLDEN,

Petitioner,

v.

OWENS-ILLINOIS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT OWENS-ILLINOIS, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

*Lloyd Sutter
David F. Guldenschuh
King & Spalding
2500 Trust Company Tower
Atlanta, Georgia 30303
(404) 572-4600

R. Jeffrey Bixler
Owens-Illinois, Inc.
One Sea Gate
Toledo, Ohio 43666

Attorneys for Respondent Owens-Illinois, Inc.

*Counsel of Record

November 14, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Does there exist any inter-circuit conflict with respect to the narrow issue raised in this appeal, i.e., whether Section 704(a) protects "opposition" to practices voluntarily undertaken by Federal contractors pursuant to Executive Order No. 11246 and government "affirmative action" regulations promulgated thereunder?

2. Should an employee, claiming discharge for "opposition" to practices governed by Executive Order No. 11246 and government regulations, be "protected" from discharge by Section 704(a) of Title VII?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
A. Proceedings Below	2
B. Statement of the Facts	4
REASONS FOR DENYING THE WRIT	13
SUMMARY OF ARGUMENT	13
ARGUMENT	14
I. NO INTER-CIRCUIT CONFLICT EXISTS	14
A. The Decision of the Court of Appeals Does *Not* Conflict with Those of Other Circuits Concerning the Standard for Establishing a Section 704(a) Violation	14
B. The Court of Appeals' Interpretation of the Scope of Section 704(a) In This Case Was Appropriate and Consistent With the Only Decisions Involving Similar Subject Matter	19
II. THIS CASE DOES NOT PRESENT IMPORTANT QUESTIONS CONCERNING THE SCOPE OF SECTION 704(a)	21
A. No Issue of National Importance Exists Which Necessitates Expansion of the Scope of Section 704(a) Because Relief is Already Provided for Under the Executive Order Program	21
B. Expansion of Section 704(a) to Provide "Absolute Immunity" For Affirmative Action Program Fiduciaries Will Itself Adversely Effect, Not Enhance, Achievement of Executive Order No. 11246 Objectives	23

TABLE OF CONTENTS—Continued

Page

III. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THIS COURT'S DECISION IN *PULLMAN-STANDARD v. SWINT* 25

CONCLUSION 26

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Berg v. La Crosse Cooler Co., 612 F.2d 1041 (7th Cir. 1980) 16

Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975) 22

Gifford v. Atchison, Topeka and Santa Fe Railway Co., 685 F.2d 1149 (9th Cir. 1982) 17

Hicks v. ABT Associates, Inc., 572 F.2d 960 (3d Cir. 1978) 21

Hochstadt v. Worcester Foundation for Experimental Biology, 545 F.2d 222 (1st Cir. 1976) 18

Holden v. Commission Against Discrimination of the Commonwealth of Massachusetts, 671 F.2d 30 (1st Cir.), *cert. denied* 459 U.S. 843 (1982) 11

Jones v. Flagship International, 793 F.2d 714 (5th Cir. 1986) 19, 24

Love v. Re/Max of America, Inc., 738 F.2d 383 (10th Cir. 1984) 16, 17

Monteiro v. Poole Silver Co., 615 F.2d 4 (1st Cir. 1980) 18

Parker v. Baltimore and Ohio Railroad Co., 652 F.2d 1012 (D.C.Cir. 1981) 17

Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130 (5th Cir. 1981) 16

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 25

Rosser v. Laborer's International Union, 616 F.2d 221 (5th Cir.), *cert. denied* 449 U.S. 886 (1980) 20, 24

Rucker v. Higher Educational Aids Board, 669 F.2d 1179 (7th Cir. 1982) 16

Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978) 17, 21

TABLE OF AUTHORITIES—Continued

Page

Sisco v. J.S. Alberici Construction Co., 655 F.2d 146 (8th Cir. 1981) 16

Smith v. Singer Co., 650 F.2d 214 (9th Cir. 1981) 16, 19, 21, 24

United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 4, 17

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 18

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983) 18

Whatley v. Metropolitan Atlanta Rapid Transit Authority, 632 F.2d 1325 (5th Cir. 1980) 19, 20

Wrighten v. Metropolitan Hospitals, Inc., 726 F.2d 1346 (9th Cir. 1984) 21

STATUTES

Civil Rights Act of 1964, as amended,

42 U.S.C. § 2000e

Section 703(a), 42 U.S.C. § 2000e-2(a) 2

Section 703(j), 42 U.S.C. § 2000e-2(j) 17

Section 704(a), 42 U.S.C. § 2000e-3(a) ..... *passim*

Section 706(g), 42 U.S.C. § 2000e-5(g) 2

42 U.S.C. § 1981 21

National Labor Relations Act, Section 8(a)(4), 29 U.S.C. § 158(a)(4) 22

Fair Labor Standards Act, Section 15(a)(3), 29 U.S.C. § 215(a)(3) 22

Occupational Safety and Health Act, Section 11, 29 U.S.C. § 660 22

TABLE OF AUTHORITIES—Continued

Page

REGULATIONS

Executive Order No. 11246 ..... *passim*

41 C.F.R. Part 60-1 ..... *passim*

§ 60-1.32 21

41 C.F.R. Part 60-2 ("Revised Order No. 4") ..... *passim*

§ 60-2.11 ..... 6, 17, 23

§ 60-2.12 ..... 6, 7, 17, 23

§ 60-2.30 ..... 7, 17

41 C.F.R. Part 60-30 ..... 18, 23

41 C.F.R. § 60-60.2a 9

RULES

Rule 52(a), Fed. R. Civ. P. 25

No. 86-645

In The

Supreme Court of the United States

October Term, 1986

E. MARIE HOLDEN,

Petitioner,

v.

OWENS-ILLINOIS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT OWENS-ILLINOIS, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent, Owens-Illinois, Inc. ("Owens"),* prays that the Writ of Certiorari sought by petitioner, E. Marie Holden ("Ms. Holden"), be denied because the Sixth Circuit correctly held *as a matter of law* that Owens discharged petitioner for statutorily "unprotected" activity.

* Owens-Illinois, Inc. has listed in the Appendix hereto its subsidiaries, other than wholly-owned subsidiaries, and affiliates, as required by this Court's Rule 28.1.

STATEMENT OF THE CASE

A. Proceedings Below

This case involves, for purposes of the instant review, a single issue: whether petitioner was discharged because she opposed practices by her employer *made unlawful by Title VII.* Section 704(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a) ("opposition clause").[1]

In its decision on liability entered July 25, 1984, the district court made *no specific findings* either identifying any Owens' practices (actual or perceived) which were made unlawful by Title VII that were opposed by petitioner or connecting causally her discharge and any protected opposition activity. On the other hand, the district court did make specific findings as to petitioner's unsatisfactory behavior: "her zeal to do the work she was employed to do tended to make [her] more rigid and unyielding in her demands than she perhaps should have been" (Petitioner's Appendix—Pet. App. 26a-27a); "with more

---

[1] This statute reads in relevant part:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed *any practice made an unlawful employment practice by this title*" (Emphasis added).

Employer unlawful employment practices are specified in 42 U.S.C. § 2000e-2(a); and, if a court finds an employer has intentionally engaged in such unlawful practices because of race, color, religion, sex, or national origin, but *not for any reason other than Title VII prohibited discrimination,* the court may grant equitable relief. 42 U.S.C. § 2000e-5(g).

The "remedy phase" decisions of the district court, included at Pet. App. 20a-53a, were not considered by the court of appeals (*see* Pet. App. at 5a) and, therefore, should not be reviewed by this court.

zeal than good judgment, [she] moved aggressively to get action" (Pet. App. 32a); against supervisory instructions, she cancelled a scheduled plant management-community leaders meeting and failed to return home in time to confer with her supervisor before he went out of town (Pet. App. 30a); and she sought an immediate meeting in his absence with her supervisor's superiors to clarify the Company's "commitment" to affirmative action (*Id.*). Finally, notwithstanding the finding that petitioner's difficulties arose almost exclusively from the trip to Shreveport "to set up an affirmative action program" (Pet. App. 28a), the district court made several conclusory findings as to *its opinion* of certain Owens' practices which were not the subject of any opposition by petitioner, and which were not supported by any evidence of record (Pet. App. 31a-32a).

On appeal, Owens made essentially two arguments: first, the district court failed to make any *specific* findings to support its conclusion that petitioner had been discharged for opposing any Owens practices "made unlawful by [Title VII]"; and, even if petitioner was terminated because she aggressively and zealously sought to implement an affirmative action program which would comply with Executive Order No. 11246, her actions did not constitute "protected conduct."

Confronted with no specific findings of fact on the critical Section 704(a) "opposition" elements, the court of appeals examined the transcript, the record, and the district court opinion in search of a factual basis on which the district court might have decided petitioner's Section 704(a) claim, i.e., some opposition by petitioner to specific practices of Owens made unlawful by Title VII (Pet. App. 6a-7a). The appellate court, by reference to the district court opinion itself, concluded:

> "The district court held that Owens discharged plaintiff because she aggressively sought to do her job and that the discharge violated 42 U.S.C. § 2000e-3(a), the 'opposition clause'. . . . We hold that plaintiff's attempts to implement affirmative action plans which would comply with Executive Order No. 11246 do not qualify as protected activity under the opposition clause."

Pet. App. at 2a; *see also id.* at 8a. The basis of the court of appeals decision was that any alleged failure by Owens to implement its affirmative action plans did not and could not violate Title VII, a principle which this Court clearly articulated in *United Steelworkers of America v. Weber,* 443 U.S. 193, 204-08 (1979). Petitioner, as a matter of law, simply never engaged in opposition to conduct *made unlawful by Title VII.*

In addition to holding that the subject matter of petitioner's opposition was unprotected by Section 704(a), the court of appeals also held *as a matter of law* that, on the findings made by the district court and the record considered as a whole, petitioner "never proved, by a preponderance of the evidence, that the legitimate reasons that Owens offered for her termination were but a pretext for retaliation" (Pet. App. 17a). Accordingly, the Sixth Circuit reversed the district court's decision and remanded the case with instructions that petitioner's complaint be dismissed (Pet. App. 2a, 19a).

It is this decision of the court of appeals which petitioner, opposed by Owens, asks this Court to review on writ of certiorari.

B. Statement of the Facts

Ms. Holden was employed by Owens to be its Manager-Equal Opportunity Affirmative Action Programs (De-

fendant's Trial Exhibit—Def. Ex. O), a position she knew from her pre-employment interview was responsible solely for development and implementation of Executive Order No. 11246 affirmative action plans ("AAPs") which would comply with Revised Order No. 4, the regulation issued by the Federal contract compliance agency governing the form and contents of such AAPs (Trial Transcript—Tr. 73-74). Her direct supervisor, Mr. Anthony,[2] had advised her during her interview that he wanted an experienced person who was fully qualified to develop AAPs in compliance with the Executive Order program, not a "trainee" (Tr. 75-76, 588-89). Ms. Holden assured Mr. Anthony that she was familiar with the Executive Order and regulations and knew what she was doing (Tr. 75-76), even though she had intentionally misrepresented her experience and had falsified her employment history.[3]

---

[2] Mr. Anthony was Manager, Equal Opportunity. He supervised Ms. Holden and another employee in a parallel position whose responsibilities were exclusively confined to the handling of EEO discrimination charges and complaints (Def. Ex. O; Tr. 86-87, 628-29). Mr. Anthony reported to Mr. Chadwell, a black male who was director of the department (Def. Ex. O; Tr. 585-86).

[3] Owens was approached by an employment agency on petitioner's behalf (Def. Ex. J) and interviewed her after she had completed a pre-employment application form (Def. Ex. M). She misrepresented her experience to Owens as having included Revised Order No. 4 AAP work. The amendments to Revised Order No. 4 initially requiring "utilization analyses" and "goals and timetables" were promulgated in 1972. See 41 C.F.R. § 60-2.32. From 1970 to 1973 Ms. Holden was a public information officer for the Massachusetts Commission Against Discrimination (MCAD), about which employment she never informed Owens and from which organization she was discharged, see n. 9, *infra;* was then unemployed for about a

(Continued on following page)

In order to understand the job Ms. Holden was employed to perform, this Court must focus on the requirements of an Executive Order No. 11246 affirmative action plan. For non-construction contractors, these requirements are established in Executive Order No. 11246, particularly Section 202(a), in 41 C.F.R. Part 60-1, and in 41 C.F.R. Part 60-2 ("Revised Order No. 4"), particularly the requirements for development of the technically complex "work force analyses," "job groupings," "utilization analyses," and "goals and timetables" specified in 41 C.F.R. §§ 60-2.11 and 60.2.12.[4] These are the essential

---

(Continued from previous page)

year; and later worked during 1974-75 as a community affairs consultant for Supermarkets, Inc. (Tr. 16-20, 66-67, 71). She admitted that Supermarkets was not a Federal contractor and that she had never developed a Revised Order No. 4 AAP (Tr. 241-42). Notwithstanding the district court's "findings" to the contrary (Pet. App. 24a-25a), Ms. Holden was not qualified to perform the job for which Owens hired her, although the court of appeals did not address this question.

[4] In 41 C.F.R. § 60-2.11(a), the contractor is required to prepare a "work force analysis," i.e., distribution by race and sex of employees by job classification; next, it is required to categorize into "job groups" those classifications "having similar content, wage rates and opportunities," 41 C.F.R. § 60-2.11 (b); then it is required to perform *eight factor analysis* statistical comparisons between minority and female composition in the particular job groups with *relevant* internal or external (e.g., U.S. Census and other information) "availability" data to determine whether the business unit's work force either over-utilizes or *underutilizes* minorities or women, 41 C.F.R. § 60-2.11(b)(1) (minority utilization factors) and 60-2.11(b)(2) (female utilization factors). After compiling this information, the contractor is then required to adopt *voluntary* "goals and timetables" to correct its minority and female utilization deficiencies. It is important to note that the OFCCP regulations provide:

> "[I]n establishing the size of its goals and the length of its timetables, the contractor should consider the results which

(Continued on following page)

elements of an AAP without which a contractor is presumed by the U.S. Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP") to be in noncompliance status. *See* 41 C.F.R. § 60-1.40(a) and (b). The additional requirements of an AAP are set forth in 41 C.F.R. § 60-2.13.[5]

Prior to Ms. Holden's arrival in November of 1975, Owens had developed its own Procedure Manual describing in detail the content and format for its AAPs (Tr. 593 and Def. Ex. Y). Owens also had already developed and annually "critiqued" or updated AAPs for its headquarters and its *over 100* field units. (Tr. 591-93).[6] The "corporate headquarters AAP", moreover, had previously been determined by the responsible Federal enforcement agency to comply with the requirements of Revised Order No. 4 (Tr. 592; *see also* Plaintiff's Trial Ex-

---

(Continued from previous page)

would reasonably be expected from its putting forth every good faith effort to make its overall affirmative action program work."

41 C.F.R. § 60-2.12(a); see *also* §§ 60-2.12(c) ("goals should be significant, measurable, and attainable"), 60-2.12(e) ("may not be rigid and inflexible *quotas* . . ., [rather] targets reasonably attainable . . ."), 60-2.12(f) (work force expansion, contraction, and turnover are to be considered), and 60-2.30 (goals are *not* to be used to "reverse discriminate").

[5] Although the district court took judicial notice of the Executive Order and OFCCP regulations (Tr. 21), the decision on liability completely ignored the Order and regulations, as well as the existence of any distinction between Title VII discrimination and voluntary Federal contractor affirmative action obligations.

[6] *See* 41 C.F.R. §§ 60-1.40(c) and 60-2.14. During a compliance review, the government regularly reviews the immediate past year's AAP against the current AAP to ascertain what utilization improvements were possible and were achieved. 41 C.F.R. §§ 60-1.20(a), 60-2.10, 60-2.12(a), 60-2.14 (Tr. 591-92; Def. Ex. AR through AZ).

hibit—Pl. Ex. 2); and, though subsequent to her discharge and due in no part to her efforts, the Shreveport plant AAP was also found by the government to be in compliance (Tr. 592; *see* Def. Ex. AY).

During her brief tenure, Ms. Holden was given only three specific work assignments: critiques[7] of the existing Bridgeton and Waco plant AAPs for compliance with Revised Order No. 4 (Tr. 593-95, 606) and development "from scratch" of an AAP for the Shreveport plant (Tr. 596). The latter assignment was required because, *as a new plant* (Tr. 496, 498), Shreveport did not have an AAP *yet;* and, under the applicable regulations, 41 C.F.R. § 60-1.40(c), one had to be developed *within 120 days* after startup.

Ms. Holden was unable to critique either the Bridgeton or Waco AAPs (Tr. 595-96, 606). More importantly, though, the *manner* in which she undertook development of the Shreveport plant AAP, i.e., in an adversarial fashion, acting like a "Federal compliance agent," rather than as a technical advisor to plant management, was what caused the difficulties between Ms. Holden and Owens (Tr. 432-33, 481, 490-91, 510-11, 599, 601-02).

All of Ms. Holden's problems at Shreveport involved differences of opinion about what information she needed and how fast the plant personnel should supply it so she could prepare the AAP. On her first day at the Shreveport plant, Ms. Holden had a plant tour, met the plant manager, went to lunch with a friend from another company, and spent the afternoon at the state employment service getting area labor force statistical data (Tr. 152-54,

---

[7] Mr. Anthony described a "critique" as a section-by-section analysis of an existing AAP to determine whether its form and content met the requirements of Revised Order No. 4 (Tr. 595).

157-58, 292-93). The next two days she spent working at the plant, analyzing documents and other information on workforce composition and other employment related information supplied by the plant (Tr. 305-07). Ms. Holden thought she had not been given certain employee salary information, but the evidence and plant representatives' testimony reflect otherwise (Tr. 308-09, 424-26, 491-92; Pl. Ex. 13). Some of the information demanded by petitioner (*see* Def. Ex. S) could not be immediately or easily developed, the plant personnel director and his secretary explained (Tr. 424, 477-98). To assist Ms. Holden in the information compilation task, however, the plant hired and assigned to her a temporary employee (Tr. 431-33).

Ms. Holden called Mr. Anthony to say that the plant was not cooperating with her in terms of producing *immediately* some of the information she said she needed (Tr. 509-510, 599-600). Mr. Anthony advised her:

> "Well, that data could be sent to you after you get back. You know you don't have to insist on having it prepared right then and there . . . . [J]ust inform them what you want and then they would send it in [to Toledo]."

(*Id.*)[8] When petitioner's continuing demands created a stalemate, she was asked to return to Toledo (Tr. 510-11, 601-02).

After he informed her to return to Toledo, Mr. Anthony gave Ms. Holden two specific instructions: (1) pro-

---

[8] Even government compliance officers do not demand *instant* production of information. *See, e.g.*, OFCCP Revised Order No. 14, 41 C.F.R. § 60-60.2(a) (30-day return deadline).

ceed to meet, as scheduled, that afternoon with the personnel director and various community leaders (Tr. 171-73, 603); and (2) return to Toledo the next day in time to meet with him because he would be out of town on the following two days (Tr. 173, 603-04). Ms. Holden did neither. She immediately cancelled the scheduled meeting with community leaders. Moreover, she intentionally delayed returning to Toledo until Mr. Anthony had left town (Tr. 172-76, 603). And, after she returned, petitioner wrote a memorandum to Mr. Anthony's superiors requesting *in his absence* an *immediate* meeting to clarify the Company's "EEO policy/affirmative action commitments" and to discuss her "Shreveport plant visitation" (Def. Ex. U).

When Ms. Holden's supervisor returned to Toledo, he chastised her for intentionally disregarding his instructions and for attempting to embarrass him in his absence by writing her memorandum to his superiors (Tr. 605-06). He advised her that he had serious doubts about her competence and gave her the Waco AAP to critique by the end of that workday (*Id.*). Ms. Holden, however, left the office soon thereafter and did not return (Tr. 341). She never completed the Waco AAP assignment and she failed to report for work the next day.

Her supervisor made several unsuccessful attempts to contact her by telephone at home the next day (Tr 606). He then prepared a memorandum to her specifying his concerns and promising to take appropriate action upon her return (*Id.*; Def. Ex. U). When he learned while at lunch

with his supervisor of Ms. Holden's earlier mistreatment of a black staff secretary,[9] Mr. Anthony decided simply to terminate her (*Id.; see also* Tr. 562). He wrote Ms. Holden's dismissal notice upon return from lunch and mailed it to her that day (Tr. 606-07; Def. Ex. V).

In her pretrial statements and testimony, Ms. Holden predicated her claim, not on Owens' allegedly discriminatory treatment of her personally or any other specific individual, but rather on what she *perceived* to be a lack of commitment by Owens as to its affirmative action obligations. Contrary to her pre- and post-employment instructions, Ms. Holden admitted that she intended to act like a "compliance officer," rather than someone whose job it was to assist managers to develop and update their AAPs to comply with Revised Order No. 4 and the Company's AAP Procedure Manual (Tr. 278-79).

Ms. Holden was discharged because of her disagreements with Owens as to how the Company's AAPs should be developed and implemented, as well as the adversarial manner in which she had gone about her affirmative action

---

[9] The district court, Owens argued on appeal, improperly excluded the evidence on the secretary incident and refused to consider any evidence concerning the *reasons* for Ms. Holden's termination by MCAD, both indications Owens contended of petitioner's reluctance to accept supervisory direction and tendency to abuse staff personnel (Tr. 341-88, 574-80; deposition of Sharon Savage and Def. Ex. D, E, and I as Offer of Proof). *See also Holden v. Commission Against Discrimination of the Commonwealth of Massachusetts*, 671 F.2d 30 (1st Cir.), *cert. denied* 459 U.S. 843 (1982), affirming the district court decision sustaining her MCAD discharge for, among other things, behaviorial characteristics similar to those she exhibited while employed by Owens. The court of appeals never addressed this evidentiary issue.

manager's job (Tr. 601-06; Def. Ex. U and V). The district court clearly so found, i.e., she went to Shreveport "to set up an affirmative action program" (Pet. App. 28a) and her aggressive and overzealous behavior was addressed exclusively to that objective (Pet. App. 28a-32a).

Notwithstanding its specific findings that *petitioner's* "opposition" and related behavior was solely addressed to affirmative action subject matter, the district court also made several *conclusory* findings which were neither the subject of any specific opposition by petitioner, nor supported by any evidence in the record:

> ". . . [Owens'] employment practices were in many respects discriminatory, especially as to race, but also as to gender. It had been following the common practice of window dressing by token employment of minority individuals, rather than seriously trying to change its methods and to remedy the results of its past discriminatory actions."

(Pet. App. 31a-32a). Aside from the workforce composition of petitioner's own department (75% black) and evidence contained in the two AAPs—"corporate headquarters" and Shreveport plant, both of which were found to be in compliance with Executive Order No. 11246—the record contained *no evidence* on the basis of which the district court could make such conclusory findings. But, most important, the foregoing observations were those of the district court, not petitioner; and those "findings" were not subject matter about which she raised any specific opposition, nor were they the "opposition" activity causally connected with her discharge.

The record and district court findings simply show no opposition on petitioner's part to any practices by Owens

which either were or even arguably could have been perceived to be Title VII violations (Pet. App. 24a, 28a-32a). Hence, the court of appeals was correct *as a matter of law* in its conclusion, on the record and findings of fact, that petitioner had engaged in no Section 704(a) protected opposition and that she had failed to prove that her termination was a pretext for retaliation (Pet. App. 2a, 8a, 16a-17a).

———o———

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

The Sixth Circuit held that the district court failed to make any specific findings with respect to what practices Owens had engaged in, and that Petitioner had opposed, which were unlawful under Title VII. It could locate no evidence in the record from which the district court could have made any such findings. Therefore, it held that Ms. Holden's "opposition" related to subject matter, i.e., the company's lack of commitment to affirmative action under Executive Order No. 11246 and applicable regulations and her desire to act as a "compliance officer," which was unprotected by Section 704(a) of Title VII.

This appellate court decision is *not* in conflict or inconsistent with any of the authorities upon which petitioner relies. In fact, it is completely consistent with decisions of the Fifth and Ninth Circuits involving EEO specialists whose opposition activities "disabled" them from performing the jobs for which they had been hired.

Likewise, this case raises no issue of national importance which would justify *judicial* expansion of the

scope of Section 704(a); and, contrary to petitioner's assertion, to protect activities such as Ms. Holden's would adversely effect, not enhance, OFCCP's accomplishment of Executive Order No. 11246's legitimate objectives by inhibiting the ability of employers to establish voluntary AAPs in the manner they, not their EEO specialists, determine to be appropriate.

Finally, the court of appeals made no *de novo* findings of fact. It decided this case *as a matter of law* either on the findings made by the district court or, where such were lacking, on the record which permitted only one resolution of the factual issue.

ARGUMENT

I.

NO INTER-CIRCUIT CONFLICT EXISTS

A. The Decision of the Court of Appeals Does Not Conflict with Those of Other Circuits Concerning the Standard for Establishing a Section 704(a) Violation

Petitioner mistakenly argues (Petition—Pet. at 22) that the Sixth Circuit held that, in order to prevail in a Section 704(a) action, she had to prove an *actual* violation of Title VII, rather than a "reasonable belief" that some particular employer practice was unlawful under Title VII. That is not what the court of appeals held at all. Rather, the Sixth Circuit held:

> "Since Title VII does not require the adoption of affirmative action programs, to the extent that [pe-

> titioner] sought to implement an affirmative action plan which would comply with Executive Order No. 11,246, [she] was not opposing a practice that violated Title VII. Consequently, the District Court erred in treating [petitioner's] attempts to implement an affirmative action program which would comply with Executive Order No. 11,246 as protected conduct under the 'opposition clause'."

(Pet. App. 8a; *see also* Pet. App. 2a and 17a).

None of the decisions relied upon by petitioner are in conflict with the Court of Appeals' decision in this case. The Sixth Circuit simply held that a perceived violation of Title VII under an undisputed set of facts is protected by Section 704(a) only if those facts, if true, establish a Title VII violation. In this case, even if the conduct which petitioner "opposed" was true, that is, that Owens was not satisfying its affirmative action commitments, such conduct did not constitute a violation of Title VII. Petitioner could not, therefore, *as a matter of law,* establish opposition to conduct perceived to be a violation of Title VII.

Regardless of how particular appellate courts have phrased the "reasonable belief" standard, the same three elements are required to establish a *prima facie* case:

1. "opposition" to some specific conduct or practice of the employer which is a violation *of Title VII,* i.e., discriminatory on the basis of race, color, religion, sex, or national origin;
2. adverse action against the employee; and
3. a "causal connection" or "linkage" between the *protected* "opposition" and the adverse personnel action.

See, e.g., Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1136 (5th Cir. 1981) and *Love v. Re/Max of America, Inc.,* 738 F.2d 383, 385 (10th Cir. 1984). The district court acknowledged this standard (Pet. App. at 36a-37a), but then failed to render any findings with respect to what *specific* Title VII "protected" opposition was causally connected with petitioner's discharge.

In addition, however, petitioner's case differs substantially from all of the authorities she cited for at least three reasons.

First, her job circumstances differed substantially from those of the employees involved in the decisions on which she relies. Ms. Holden was employed as a technical adviser to Owens' management, responsible for making sure its AAPs complied particularly as to format and content with the requirements of Revised Order No. 4. *Compare Smith v. Singer Co.,* 650 F.2d 214, 217 (9th Cir. 1981), with authorities relied upon by petitioner, none of which involved an EEO specialist.[10] *See* Argument, *infra,* 19, 23-24.

---

[10] *Payne v. McLemore's Wholesale & Retail Stores, supra* (laid off employee picketing, among others, his employer for failure to hire blacks in supervisory and white collar jobs); *Berg v. La Crosse Cooler Co.,* 612 F.2d 1041 (7th Cir. 1980) (personnel department clerk who differed politely with Personnel Director over Company's maternity benefit policy); *Rucker v. Higher Educational Aids Board,* 669 F.2d 1179 (7th Cir. 1982) (black supervisor who refused to "set up" white female for discharge and informed his black superior that he agreed with woman's sexual harassment and other discrimination claims); *Sisco v. J.S. Alberici Construction Co.,* 655 F.2d 146 (8th Cir. 1981) (white construction worker and union shop steward who claimed "reverse discrimination" in his layoff se-

(Continued on following page)

Second, Ms. Holden's "opposition" was to the Company's "commitment" to affirmative action. As this Court clearly held in *United Steelworkers of America v. Weber*, 443 U.S. 193, 204-08 (1979), development of voluntary affirmative action programs is *permitted*, but not *required*, by Title VII when Section 703(j) of that Act is taken into consideration. Furthermore, Revised Order No. 4 itself speaks not of illegality, but of "good faith effort" to improve the utilization of minorities and women, through the use of *realistic* and *voluntary* goals and timetables. 41 C.F.R. §§ 60-2.11 and 60-2.12. Finally, Revised Order No. 4 admonishes all Federal contractors that:

> "The purpose of a contractor's establishment and use of goals is to insure that it meets its affirmative action obligation. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin."

41 C.F.R. § 60-2.30. "Opposition" to how a company seeks to develop its AAPs or achieve its affirmative action goals is simply not protected subject matter because non-compliance with Revised Order No. 4, which is enforced through

---

(Continued from previous page)

lection under AAP); *Sias v. City Demonstration Agency*, 588 F.2d 692 (9th Cir. 1978) (member of city agency seeking Mexican-American applicants who complained to Federal compliance agency about discriminatory hiring practices); *Gifford v. Atchison, Topeka & Santa Fe Railroad Co.*, 685 F.2d 1149 (9th Cir. 1982) ("relief" clerk who claimed discriminatory effect resulted from labor agreement expansion of geographic work area); *Love v. Re/Max of America, Inc., supra* (female executive who complained about pay discrimination against her); and *Parker v. Baltimore and Ohio Railroad Co.*, 652 F.2d 1012 (D.C. Cir. 1981) (white male employee complaining about reverse discrimination precluding *his* employment opportunities in favor of black beneficiaries of an AAP).

an entirely different legal framework, *see* 41 C.F.R. §§ 60-1.26, 60-1.28, and 41 C.F.R. Part 60-30, is *not* synonomous with *discrimination* "made unlawful by this subchapter [Title VII]." 42 U.S.C. § 2000e-3(a).

Third, Section 704(a) protects *expression of opinion*, not *conduct*. The *manner* in which Ms. Holden conducted herself was the ultimate, uncontradicted cause of her discharge. Her refusal to accept directions and adversarial approach to everything connected with her brief Owens' employment compares to that found unprotected in *Hochstadt v. Worchester Foundation for Experimental Biology*, 545 F.2d 222, 231 (1st Cir. 1976); *see also Monteiro v. Poole Silver Co.*, 615 F.2d 4, 7-8 (1st Cir. 1980) (opposition raised as a "smokescreen" for disregard of supervisory instruction is not activity protected by Section 704(a)).

Ms. Holden's evidence and the district court's findings were missing two essential elements of a *prima facie* Section 704(a) "opposition clause" case: opposition to protected subject matter and any causal connection between such protected opposition and her discharge. In addition, the court of appeals accepted the district court's findings of fact as to petitioner's "rigid and unyielding demands" and the district court's implicit acknowledgement that she had "engaged in numerous instances of unsatisfactory behavior," quoting from its findings on the post-Shreveport visit activities (Pet. App. 16a-17a). Where the facts justified Owens' termination of Ms. Holden if the subject matter of her opposition was unprotected, then she could not *as a matter of law* prove that such legitimate reasons for discharging her were a pretext for unlawful retaliation *(Id.)*. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *United States Postal Service*

Board of Governors v. Aikens, 460 U.S. 711 (1983). The conclusion reached by the court of appeals was correct, therefore, where its differences of opinion with the district court were *as a matter of law*, not fact.

B. The Court of Appeals' Interpretation of the Scope of Section 704(a) In This Case Was Appropriate and Consistent With the Only Decisions Involving Similar Subject Matter

The court of appeals, in deciding the instant case, analogized it properly to the only appellate court decisions involving similar subject matter. *Smith v. Singer Co., supra; Whatley v. Metropolitan Atlanta Rapid Transit Authority*, 632 F.2d 1325 (5th Cir. 1980); *see also Jones v. Flagship International*, 793 F.2d 714 (5th Cir. 1986). These cases hold that Section 704(a) grants equal opportunity officers or affirmative action specialists no special brand of protection. In fact, the Sixth Circuit noted that individuals in such jobs are distinguishable from other employees:

> "The position was unique in that it required the occupant to act *on behalf of* his employer in an area where normally action against the employer and on behalf of the employees is protected activity."

Pet. App. at 14a, quoting *Singer, supra*, at 217.

Owens, like Flagship International, was entitled to require a "commitment" from Ms. Holden to *its* affirmative action program interests, not her own. As the Fifth Circuit held in *Flagship:*

> "[I]t was her position as a representative of the company in EEO matters, not her methods, which created the conflict of interest."
>
> * * *
>
> "[S]ome conduct, even if sincere opposition to employment practices under Title VII, may be so disruptive or inappropriate as to fall outside the protection of § 704(a)."

793 F.2d at 725 n. 12 and 728. *Cf. Rosser v. Laborers' International Union,* 616 F.2d 221, 223 (5th Cir.) *cert. denied* 449 U.S. 886 (1980) (employee's "conduct . . . so interferes with the performance of his job that it renders him ineffective in the job for which he was employed").

Ms. Jones' opposition in *Flagship* was to Title VII subject matter; yet, because of her position with the company, it was unprotected by Section 704(a). In Ms. Holden's case her opposition was not even to Title VII subject matter, all the more reason why, in light of her AAP manager position, it should be held "unprotected" by Section 704(a). The Sixth Circuit, therefore, in reliance on *Singer* and *Whatley,* and based on the district court's own findings, properly concluded that petitioner's deviation from her unique fiduciary duty in favor of assuming a self-proclaimed compliance officer role "disabled" her from performing the job for which she had been employed. Such interpretation of Section 704(a), given the unique facts of this case, was consistent with applicable precedent and altogether appropriate.

II.

THIS CASE DOES NOT PRESENT IMPORTANT QUESTIONS CONCERNING THE SCOPE OF SECTION 704(a)

A. No Issue of National Importance Exists Which Necessitates Expansion of the Scope of Section 704(a) Because Relief is Already Provided for Under the Executive Order Program

While petitioner would like this Court to review her case, it involves no issue of national importance because of its unique facts. The authorities relied upon by Ms. Holden in Part II-A of her petition (Pet. at 31-36) do not justify issuance by this Court of a writ.[11]

When Congress enacted Title VII, it provided an anti-retaliation provision in Section 704(a) similar to provisions

---

[11] Petitioner cites (Pet. 29-30) four cases for the proposition that Section 704(a) should encompass opposition such as Ms. Holden's. *Smith v. Singer Co., supra; Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346 (9th Cir. 1984); *Hicks v. ABT Assoc., Inc.*, 572 F.2d 960 (3d Cir. 1978); and *Sias v. City Demonstration Agency, supra*. None are apposite. *Wrighten, Hicks,* and *Sias* all involve employees, other than EEO specialists, complaints concerning *specific* employer practices claimed to violate Title VII. In *Wrighten,* hospital employment practices, i.e., staffing, were the Title VII subject matter to which complainant attributed the inadequate black patient care. *Singer* is discussed, *supra*. Petitioner's reliance (Pet. 30 and n. 23) on appellate court recognition of Section 704(a) protection of opposition in the parallel 42 U.S.C. § 1981 context is simply inapplicable. Non-compliance with voluntary affirmative action obligations is not synonomous with or analogous to discrimination prohibited by Title VII.

included in other employment laws.[12] This Court, however, has cautioned against attempts to use activity "protected" in one statutory context to accomplish objectives "unprotected" in another. *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50, 70-73 (1975). Section 704(a) of Title VII should not be expanded to protect opposition to a company's commitment to affirmative action.

It is, furthermore, unnecessary for this Court to expand *judicially* the scope of Section 704(a) beyond "opposition" to practices which are made violative of Title VII because the Executive Order Program provides its own anti-retaliation protection. Specifically, 41 C.F.R. § 60-1.32 already provides that the OFCCP Director in appropriate circumstances can institute enforcement proceedings against any employer:

> " . . . [W]ho fails to take all necessary steps to ensure that no person intimidates, threatens, coerces, or discriminates against any individual for the purpose of interfering with . . . any other activity related to the administration of the order . . ."

See also 41 C.F.R. § 60-1.24 (Executive Order Program Complaint Procedure).

The *Weber* distinction between discrimination prohibition and affirmative action compliance should, therefore, be preserved; and, absent amendment *by Congress,* the scope of Section 704(a) should not be *judicially broadened* to in-

---

[12] *E.g.,* Section 8(a)(4) of the National Labor Relations Act, 29 U.S.C. § 158(a)(4); Section 15(a)(3) of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) and Section 11 of the Occupational Safety and Health Act, 29 U.S.C. § 660. Petitioner has so recognized (Pet. at 32 n. 24). Each of these statutes' anti-retaliation provisions protect opposition with respect to *that statute's* subject matter.

clude "opposition" to a company's affirmative action practices.

B. Expansion of Section 704(a) To Provide "Absolute Immunity" For Affirmative Action Program Fiduciaries Will Itself Adversely Effect, Not Enhance, Achievement of Executive Order No. 11246 Objectives

Pressure is already exerted by government compliance officers upon the nation's employers to satisfy the requirements of Executive Order No. 11246 and Revised Order No. 4. *See* 41 C.F.R. §§ 60-1.26 to 60-1.33; *see also* 41 C.F.R. Part 60-30.

Satisfaction of the requirements of Revised Order No. 4, particularly the annual revision of "utilization analyses," 41 C.F.R. § 60-2.11, and the preparation on the basis thereof of "goals and timetables", 41 C.F.R. § 60-2.12, is technical and complex. It is, therefore, necessary for employers to hire affirmative action specialists whose interests are consistent with those of the company. These individuals, as distinct from other employees, simply cannot be licensed to act as adversaries of management.

The Ninth Circuit said it well when, declining to apply Section 704(a) to protect an affirmative action specialist, it noted:

> "The question is whether, under § 2000e-3(a), it is protected activity for this executive employee, occupying this position of responsibility, to take such action against the company he represents in support not of his own rights but of the perceived rights of those with whom it is his duty to deal on behalf of the company. *If § 2000e-3(a) gives him the right to make himself an adversary of the company, then so long as he does not give nonprivileged cause for dismissal he is forever*

> *immune from discharge. Section 2000e-3(a) so construed renders wholly unworkable the program of voluntary compliance which appellant was employed to conduct.* It was the same public interest in equal employment opportunities that brought forth both Title VII and the executive orders and regulations in question. Surely there must be room for them to operate harmoniously."

Smith v. Singer Co., supra, at 217 (emphasis added).

Just as Mr. Smith betrayed his employer surreptitiously, Ms. Holden "disabled" herself with Owens' management by seeking to enforce her own affirmative action demands instead of acting "on behalf of" the Shreveport plant consistent with her supervisor's instructions to develop and audit AAPs which would ensure that the company satisfied Revised Order No. 4. Ms. Holden simply created a "conflict of interest" between herself and Owens to the extent that she became ineffective in the job for which she had been employed. *Jones v. Flagship International* and *Rosser v. Laborers' International Union, supra.*

What petitioner seeks in this writ is transformation by this Court of Section 704(a) from a *shield* against retaliation for opposition to conduct violative of Title VII into a *sword* for use within a Company to achieve personal affirmative action goals inconsistent with company-established procedures and beyond those specified by the Federal regulations. OFCCP does not need a private attorney general within each company to accomplish the Executive Order's objectives and Section 704(a) should not be misapplied in a way which will surely disrupt the ability of employers to pursue voluntary affirmative action compliance and goals in the manner they, not their EEO specialists, deem most appropriate.

III.

THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THIS COURT'S DECISION IN PULLMAN-STANDARD V. SWINT

In *Pullman-Standard v. Swint*, 456 U.S. 273, 287-93 (1982), this Court criticized an appellate court's practice of holding itself bound under Rule 52(a) by "subsidiary facts" found by the trial court, but not by findings as to "ultimate facts." This Court went on to hold:

> "Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. . . . This Rule does not apply to conclusions of law. The Court of Appeals, therefore, was quite right in saying that if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis."

Id. at 287. Moreover, the Court held:

> "[W]here findings are infirm because of an erroneous view of the law, a remand is the proper course *unless the record permits only one resolution of the factual issue.*"

Id. at 292 (emphasis added).

In the instant case the court of appeals did not make *de novo* findings of fact. It accepted the district court's *specific* findings regarding the *subject matter* and *manner* of Ms. Holden's opposition activities. However, it noted that the district court did not make any specific findings of fact as required by Rule 52(a) with respect to *any specific practices of Owens* which *petitioner opposed* that she *perceived* to be "made unlawful *by Title VII*" (Pet. App. at 6a). The court of appeals then examined the transcript, the record, and the district court's opinion in search of any facts suggesting petitioner's "opposi-

tion'' was addressed to Title VII, rather than affirmative action, subject matter; and it found *none*.

Based upon the findings which the district court made and the absence of any record evidence of opposition to Title VII subject matter, the court of appeals properly concluded—''the record permit[ting] only one resolution of the factual issue,'' 456 U.S. at 292—that the district court had erred *as a matter of law* by granting petitioner relief with respect to opposition addressing subject matter ''unprotected'' by Section 704(a).

CONCLUSION

For the foregoing reasons, a writ of certiorari should *not* issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

*Lloyd Sutter
David F. Guldenschuh
King & Spalding
2500 Trust Company Tower
Atlanta, Georgia 30303
(404) 572-4600

R. Jeffrey Bixler
Owens-Illinois, Inc.
One Sea Gate
Toledo, Ohio 43666

Attorneys for Respondent Owens-Illinois, Inc.

*Counsel of Record

November 14, 1986

APPENDIX

Owens-Illinois, Inc., pursuant to Rule 28.1 of this Court, identifies the following as its subsidiaries, other than wholly-owned subsidiaries, and affiliates:

Advanced Graphics, Inc.
Milford, NH

Andover Controls Corporation
Andover, MA

HCRC Services, Inc.
Toledo, OH

HCRC Services of Illinois, Inc.
Toledo, OH

HCRC Services of South Carolina, Inc.
Toledo, OH

HCRC Services of Texas, Inc.
Toledo, OH

Prudent Supply, Inc.
Minneapolis, MN

Toledo Air Associates, Inc.
Toledo, OH

O-I/Schott Process Systems, Inc.
Vineland, NJ

Owens-Illinois de Puerto Rico
Puerto Rico

Societe Anonyme de Developpement du Verre de Table Mecanique
Belgium

Libbey St. Clair Inc.
Canada

Cristal Owens Plasticos Ltd.
Chile

Cristaleria Peldar, S.A.
Colombia

Cristaleria del Ecuador, S.A.
Ecuador

Middle East Glass Mfg. Co.
Egypt

Emballages Laurent, S.A.
France

Papeteries d'Espaly, S.A.
France

Papeteries Etienne, S.A.
France

Hellenic-Owens Elefsis Glass Company, S.A.
Greece

P. T. Igar Jaya
Indonesia

P. T. Kangar Consolidated Industries
Indonesia

Nippon Electric Glass Company, Limited
Japan

Nippon Glass Kabushiki Kaisha
Japan

Sasaki-Owens Glass Co., Ltd.
Japan

Sun-Lily Co. Ltd.
Japan

Hankuk Electric Glass Co., Ltd.
Korea

Cajas Corrugadas de Mexico, S.A.
Mexico

Cajas y Empaques de Occidente, S.A.
Mexico

Envases de Borosilicato, S.A.
Mexico

Inmuebles Heda, S.A.
Mexico

Kraft, S.A.
Mexico

Union Glass & Container Corporation
Phillippines

Consol Limited
South Africa

U.S.I. Far East Corporation
Taiwan

Manufactuera de Vidrios Planos, C.A.
Venezuela